IN THE

Supreme Court of the United States

OCTOBER TERM—1941

JOSEPH H. MOSKOWITZ,

Petitioner,

—against—

UNITED STATES OF AMERICA,

Respondent.

BRIEF IN SUPPORT OF PETITION

Opinion Below.

The opinion of the Court below, dated March 21, 1942, not yet reported, is annexed to the certified transcript of the record (R. 3616-30).

Jurisdiction.

The judgment of the Circuit Court of Appeals was entered on April 6, 1942. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended (U. S. C. Title 28, Sec. 347 (a)), and the Rules of Practice and Procedure in Criminal Cases promulgated by this Court.

On April 6, 1942, the Court below granted petitioner's motion to stay the issuance of its mandate pending the application to this Court for a writ of *certiorari*.

Statement of the Case.

A summary statement of the case is set forth in the petition. A summary of the argument is set forth in the index.

Specification of Assigned Errors To Be Urged.

It is intended to urge the following errors:

I—It was reversible error to admit Government Exhibit 148.

II—The Court below committed reversible error in refusing to limit the issues to business expense deductions and in giving a confusing charge regarding gambling.

III—The petitioner was fundamentally deprived of a fair trial because the jury were not correctly instructed on the law, through (a) conflicting instructions on the elements of the crime; (b) refusal to charge that a deduction of a proper item claimed at the trial, though not claimed on the tax return, should be allowed; (c) refusal to define "ordinary and necessary" and substitution of the test of "legitimate"; (d) the erroneous instruction as to the law dealing with the making of an estimate; and (e) erroneous charge regarding deductibility of business entertainment expenses at home.

IV—The exclusion of the testimony of a revenue agent subpoenaed by the petitioner constituted reversible error and deprived petitioner of constitutional rights.

V—The refusal to charge as requested and the erroneous charge regarding the weight to be given to character evidence constituted reversible error.

ARGUMENT

POINT I.

It was reversible error to admit Government Exhibit 148. It was not supported by evidence. If it represented the U. S. Attorney's opinion, it was hearsay. If it was intended as a hypothetical question, its hypotheses were inarticulate and unparticularized.

There is no basis in the evidence* except the fact of Mr. Correa's direction to support the disallowance of expenditures as shown in the exhibit. The burden lodges with the Government throughout the trial and it is the inescapable burden of the Government to prove that disallowed expenditures were of a non-business character. The record reveals that this burden was not met and that the disallowances are unsupported by evidence other than the statement of the witness that he disallowed the items because Mr. Correa told him to (R. 1008; 3628).

In so far as the exhibit purports to record what Mr. Correa said, it is hearsay.

The admission of the exhibit cannot be supported as a hypothetical question, as contended by the Government, because the witness did not base the conclusions in the exhibit on assumptions given to him, and the jury were not

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* The Court below held: "Evidence was presented tending to prove that of the $38,399.21 of cash, deducted at the 50% rate, $10,000. represented a gambling debt * * *" (R. 3623). If this were a correct statement, the Government would have shown that more than 50% of this cash item was personal. However, the Court below, as well as the Trial Court and counsel during the trial, erred as to this $10,000. item. The error was the belief that no $10,000. item of cash spent existed other than Check #4457 (R. 2136), and this check was proven to have been a gambling expenditure. The correct fact, however, was that cash Check #3490 for $10,000. (R. 2202), not #4457, was the proper check embraced within the total of $38,399.21. As to Check #3490, there was no proof whatever of non-business purpose. The serious effect of this error during the trial appears from the cross examination of petitioner (R. 1638-40, 942, 1195, 1196). The unfortunate persistence of this error appears from the above quotation from the opinion below.

told what the factual bases were nor that these bases were only assumptions, the correctness of which it was their function to decide. The witness was not asked to assume anything. He and Mr. Correa decided in favor of the Government all the numerous controverted issues. Thus the essential element of a hypothetical question by which it is saved from invading the province of the jury was eliminated.

U. S. v. *Johnson*, 123 F. (2d) 111 (C. C. A. 7).

Whatever the bases actually used by the witness in preparing Exhibit 148, they were not stated in the form of assumptions. In the Government's brief to the Circuit Court of Appeals the admission of the exhibit is supported on the ground that it was a hypothetical question based on all the evidence (Brief for Appellee, p. 65). A hypothetical question cannot be based on all the evidence, but must be based on questions which the witness is asked to assume.

II *Wigmore on Evidence*, 3rd Ed. p. 800;
People v. *McElvaine*, 121 N. Y. 250 (1890).

The Court of Appeals in the *McElvaine* case said:

> "We think it is not competent in any case to predicate a hypothetical question to an expert upon all the evidence in the case, whether he has heard it all or not, on the assumption that he then recollects it, for it would then be impossible for the jury to determine the facts upon which the witness bases his opinion and whether such facts were proved or not."

The rule adopted by the Court below is in conflict with the rule adopted by the Circuit Court of Appeals for the Seventh Circuit.

U. S. v. *Johnson*, 123 F. (2d) 111 (C. C. A. 7).

This Court granted a writ of *certiorari* in the *Johnson* case on February 2, 1942. The case has now been assigned for reargument next October. Thus the Court has the question here presented pending for consideration before it. As pointed out in the petition, the Court below recognized that there was a conflict between the rule it adopted and the rule adopted in the Seventh Circuit, and stated in its opinion that it preferred to follow the dissenting opinion in the *Johnson* case.

POINT II.

The Trial Court committed reversible error in refusing to limit the 1936 issue to business expense deductions and in giving a confusing charge regarding gambling.

The Court below erred in sanctioning the refusal of the Trial Court to grant the request limiting the 1936 issue to deductible expenses. In so doing it applied an erroneous standard as a test for reversible error. It held that the petitioner had the burden to show affirmatively that the jury actually "was confused" and disregarded the established rule of law that where there is a "fair possibility" that the jury may have been misled reversible error has been committed.

McElroy v. *U. S.*, 164 U. S. 76;
Crawford v. *U. S.*, 212 U. S. 183;
Stromberg v. *California*, 283 U. S. 359;
Bruno v. *U. S.*, 308 U. S. 287;
McCandless v. *U. S.*, 298 U. S. 342;
Pierce v. *U. S.*, 314 U. S. 306;
Glasser v. *U. S.*, U. S. , decided January 19, 1942.

POINT III.

The petitioner was fundamentally deprived of a fair trial because the jury were not correctly instructed on the law through (a) conflicting instructions on the elements of the crime; (b) refusal to charge that a deduction of a proper item claimed at the trial, though not claimed on the tax return should be allowed; (c) refusal to define "ordinary and necessary" and substitution of the test of "legitimate"; (d) the erroneous instruction as to the law dealing with the making of an estimate; and (e) the erroneous charge regarding deductibility of business entertainment expenses at home.

(a) ***Conflicting instructions on the elements of the crime.***

The Court charged that the elements of the crime, under the first three counts, were two: (1) whether defendant Schenck owed more than he reported, and (2) whether there was a wilful intent to evade and defeat any part of the tax by filing a fraudulent tax return. Later, referring to the same crime for 1937 (Count three), he charged that the fact that Schenck may have overpaid his income tax for 1937 did not excuse him or Moskowitz from criminal liability (R. 1838). These inconsistent definitions of the crime constitute reversible error. Referring to this charge, the Court below said:

> "This is likewise true of that portion of the charge complained of because it told the jury that a conviction could be had even though no additional tax was due. Having been acquitted upon the third count, the appellants were obviously not prejudiced by any errors in the instructions directed to this count. Moreover, the court had clearly stated previously that the first ele-

ment of the crime in the first three counts was whether Schenck 'owed more tax than he reported.' "

Thus the Court below gave two reasons for holding that the admitted error in the Trial Court's charge was non-prejudicial. First, because the second part of the charge referred to 1937, the year on which petitioner was acquitted, and did not expressly refer to 1936, on which the petitioner was convicted. Second, even assuming that the incorrect charge applied to 1936, the Trial Court had previously given a correct charge for that year.

With respect to the additional reason for non-prejudice given by the Court below, to wit, that the Trial Court had previously given a correct charge of the elements of the crime, the opinion of the Court below lays down an astounding and dangerous rule of law, namely that a Trial Court may give a correct charge on the essential elements of a crime, and later an utterly contradictory and erroneous charge on the same subject, without committing reversible error. Such a rule nullifies the function of a Trial Court as the officer charged with the duty of giving the jury the law, and permits the jury to decide not only the facts, but also the law applicable. Here is a departure from the usual course of judicial proceedings. The Court below sanctions such a departure by holding the error non-prejudicial. Courts in other circuits have taken a contrary view and have held a contradictory erroneous charge to be reversible error.

Nicola v. *U. S.*, 72 F. (2d) 780 (Third Circuit);
Kuhn v. *U. S.*, 42 F. (2d) 210 (Third Circuit).

This Court has also laid down the same rule.

Mills v. *U. S.*, 164 U. S. 644.

Such holding by the Court below should impel this Court to grant *certiorari.*

Furthermore, the Court below held that because the concededly erroneous part of the charge expressly referred to 1937, upon which there was acquittal, and did not refer to 1936, upon which there was conviction, petitioner was "obviously" not prejudiced. The jury were told first that the elements of the crime were the same for all three years. They were later given a concededly erroneous charge with respect to the elements of the same crime for 1937. There is a grave possibility, and indeed probability, that they inferred that the erroneous charge for 1937 also applied to 1936, and that they might convict for 1936 even though no additional tax was due. Certainly there is nothing in the record to show that they did not draw such an inference. This Court has held that an erroneous charge on one count, which had a prejudicial effect upon the defendant with regard to other counts, is ground for reversal of a conviction of such other counts.

Graves v. *U. S.,* 165 U. S. 323.

This Court has frequently held that substantial error is reversible unless it appears so clearly as to be beyond doubt that there was no prejudice and could have been none.

McElroy v. *U. S.,* 164 U. S. 76;
Crawford v. *U. S.,* 212 U. S. 183.

And where, as in this case, it cannot be known how much the jury were influenced by error, this Court has held the error is reversible error.

Stromberg v. *California,* 283 U. S. 359.

(b) ***The refusal to charge that a deduction of a proper item claimed at the trial, though not claimed on the tax return, should be allowed.***

There was evidence that Schenck had omitted to take in his income tax return certain deductions to which he was regularly entitled. Petitioner requested the Trial Court to charge (R. 1862) that "even if the taxpayer did not claim the item at all in his return, if it be a proper adjustment he is entitled to it, and this rule must be taken into consideration in determining whether there was in fact any tax due over and above that which he paid" (R. 1862).

The Trial Court refused the requested instruction and gave no instruction at all on this topic. The request unquestionably laid down a correct rule of law. Certainly it is correct law in the determination of an additional tax due in *civil* tax cases. The Court below has itself so held in civil tax cases.

> *Internat'l Banding Machine Co.* v. *Commissioner,* 37 F. (2d) 660, 662.

The Board of Tax Appeals has likewise so held.

> *Gutterman Straus Co.,* 1 B. T. A. 243;
> *Davison-Joseph Realty Co.,* 41 B. T. A. 675.

And this Court has applied a similar rule in the determination of refunds, by holding that in computing an overpayment the entire tax liability for the year must be redetermined.

> *Lewis* v. *Reynolds,* 284 U. S. 281.

Certainly in a criminal tax case, where an element of the crime is whether an additional tax is due, the same rule,

that the entire tax liability must be redetermined, should apply.

We conceive the law to be that the refusal to grant such a request, correct in law, and not otherwise covered by the charge, is reversible error. The reason is that where there is a statute specifying the elements of a crime, there is an implied direction from Congress contained in such statute, within the reasoning of this Court in *Bruno* v. *U. S.*, 308 U. S. 287, that the Trial Court shall, upon request, clearly instruct as to such elements. This the Trial Court failed to do. Aside from such implied direction, we contend that the failure to grant such a request is reversible error where it cannot be said that the petitioner was not prejudiced. There is nothing to show what, if any, of the deductions claimed in the return the jury disallowed, and therefore it is impossible to say whether petitioner's proof of additional deductions would or would not have off-set the disallowed deductions. The Court below misapplied the case of *Paschen* v. *U. S.*, 70 F. (2d) 491, 502 (C. C. A. 7).*

(c) *The Trial Court erroneously refused to define "ordinary and necessary", and substituted the test of "legitimate".*

The deductions claimed herein were for expenses actually incurred. The money was spent. The issue was whether the expenses were deductible under the statute, 26 U. S. C. A. par. 23 (a) which provides (see appendix) that a taxpayer may deduct "all the *ordinary* and *necessary* expenses paid or incurred during the taxable year in carrying on any trade or business." (Italics ours.)

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* That case is clearly distinguishable. In that case the Court did charge the jury that they might consider unclaimed deductions, and though the Court erred as to degree of proof, no exception was taken to the erroneous charge. In the *Paschen* case there was practically no dispute with the Government's adjustment that the omitted income far exceeded the unclaimed deductions, whereas in the case at bar, no such undisputed excess appears.

In *Welch* v. *Helvering*, 290 U. S. 111, Mr. Justice Cardozo in defining "ordinary" said:

> "Now, what is ordinary, though there must always be a strain of constancy within it, is none the less a variable affected by *time*, *place* and *circumstance* * * *." (Italics ours.)

In *Deputy* v. *Dupont*, 308 U. S. 488, Mr. Justice Douglas, in defining "ordinary" said:

> "One of the extremely relevant circumstances is the nature and scope of the *particular business* out of which the expense in question accrued * * *. It is the kind of transaction out of which the obligation arose and its normalcy in the *particular business* which are crucial and controlling." (Italics ours.)

Also in *Welch* v. *Helvering*, *supra*, Mr. Justice Cardozo, in discussing the word "necessary", said:

> "We may assume that the payments to creditors of the Welch Company were necessary for the development of the petitioner's business, at least in the sense that they were *appropriate and helpful*." (Italics ours.)

The words "ordinary" and "necessary" are not so clear and unambiguous in their meaning and application as to leave no room for further instructions. *Textile Mills Security Corp.* v. *Commissioner*, 62 S. Ct. 272, 279.

The defense requested the Court to charge that for an expenditure to be deductible as a business expense, the law requires only that it be an "ordinary" and "necessary" expense incurred in the carrying on of a trade or business, the words "ordinary" and "necessary" in this connection

meaning "appropriate" and "helpful", and that "in determining whether an expense was in fact an 'ordinary' and 'necessary' business expense, regard must be given to all of the circumstances, including time, place, nature of business, nature of the individual, standards of the industry, expenses customarily made by others in the same line of business, and other similar circumstances" (R. 1868).

The Trial Court ignored these requests. The Court below did not say that petitioner's requests incorrectly stated the law. The Court below held that it was sufficient if the jury were told that the expenses were deductible if they were "legitimate" or "necessary and legitimate" or "ordinary and necessary" (R. 1841-2). Actually the Trial Court emphasized the word "legitimate" by repeating it five times within ten lines (R. 1841).

The meaning and application of the words "ordinary and necessary" have proved most difficult for bodies charged with the administration of the income tax law and for income tax experts. The trial of the crime of attempted tax evasion imposes upon a lay jury the duty of determining the existence of one of the elements of the crime, namely, whether an additional tax is due. It should be the duty of the Trial Court in such a case to give the jury all possible assistance, particularly in a complex case such as the instant one. The failure to give the requested charge resulted in the fatal defect of depriving the jury of the proper standard to apply.

The jury were not told that "ordinary" meant "ordinary" for the particular taxpayer in the motion picture industry, or that they must consider all the other circumstances pointed out in the requests to charge. They were not told that "necessary" meant not a rigorous test of absolute imperative necessity but only "appropriate or helpful." They might well have applied their own particular standards of what was ordinary and necessary in their own daily lives. With-

out proper instruction, they could not be expected to know what the law required as to what standards to apply. Kinds of entertainment and amounts of entertainment foreign to their own experience could be regarded by them as not ordinary and necessary, even though it might well have been ordinary and necessary expenditure for the petitioner in his business. It would be natural for a jury not to understand that expenses such as some of those incurred by Schenck in lavishly entertaining people in the motion picture industry and prospective actors, actresses and writers, were "ordinary" or "necessary" expenses. The usual layman may consider an expense of this kind either extraordinary or unnecessary as measured by his own standards.

In view of the clear law on the meaning of "ordinary and necessary," the failure of the Trial Court to grant the requests is inexplicable. The decision of the Court below in sustaining the action of the Trial Court is clear prejudicial error, and is in conflict with the principles enunciated by this Court in the cases herein cited on pages 25, 31 and 36.

The administrative bodies charged with enforcing tax law have recognized that the moving picture industry has its own standards of entertainment. In *Hal E. Roach Studios*, 20 B. T. A. 917, the Board said in referring to the motion picture industry:

> "Its criteria of what are ordinary and necessary are very different from most businesses."

In *Madge H. Evans*, B. T. A. Mem. Op. C. C. H. Decision #10,620-d the Board said, with reference to business expense deductions of a motion picture actress:

> "Maintenance of her position in the industry required certain expenditures that would be unnecessary for the average person engaged in business * * *. In deciding

whether the disbursements made by the petitioner were ordinary and necessary expenses of her profession we must examine the disbursements from the standpoint of their relation to her business and in the light of the 'time, place and circumstance' under which they were made."

(d) ***The Trial Court erroneously instructed the jury as to the law dealing with the making of an estimate.***

Many of the items of expenditure, particularly entertainment expenditure, were incurred partly for business purposes and partly for personal purposes. The taxpayer made an estimate of the proportion of these expenditures properly chargeable against business, and used that estimate in making his return. It was impracticable to sit down and go over each item or bill. Such a laborious process might have eliminated a few items, but in the last analysis the taxpayer would have had to estimate business expenses (R. 1662-3). The method by which the estimate was made is described in the testimony in detail (R. 1496-7). The Trial Court held that the taxpayer had a right to resort to estimate only after exhausting all available sources of information. This erroneous holding was sustained by the Court below (R. 3624). This ruling was wrong. It places a burden upon the taxpayer to make an audit of all obtainable information without limit and denies the privilege of estimate except where there is not only no knowledge but no possible means of obtaining information. Such a standard goes far beyond any basis in use by taxpayers, and far beyond any reasonable standard for determining criminality.

It was error for the Trial Court to instruct, and the Court below sustained this, that there is only one method to estimate deductible business expenses. In the absence of Statute or Regulations, any fair method may be used.

This complicated case required the simplest and clearest statement from the Court as to the law on the important subject of estimates. The Court's charge was such that no lay jury could fairly be expected to understand it.

(e) ***The Trial Court gave erroneous instructions as to Schenck's right to deduct business entertainment expenses at home.***

The facts in this connection are summarized under Point III (e) of the matters involved in the petition. The requested charge correctly sets forth the law on the subject. The Board of Tax Appeals has held that if one's home is used partly for entertainment for business purposes, a part of the expense of running the home may properly be deducted as a business expense. Instead of giving the correct charge, as requested, the Court modified the request, and after charging that personal living and family expenses were not deductible, gave the following charge (R. 1841):

> "Traveling and living expenses, while away from home, and entertainment, can be deducted as business expenses if the traveling and living expenses and entertainment are legitimate expenses incurred in the carrying on of a business."

We contend that the word "entertainment" in the above quotation must be read in connection with the words "traveling and living expenses," and as so read is subject to the same limiting words "away from home." If that interpretation is correct, then the charge was entirely inadequate and was silent as to the taxpayer's right to deduct entertainment expenses "at home." If the Trial Court intended to instruct the jury that entertainment expenses for business purposes at home were not deductible, then the charge

was erroneous. *Ned Wayburn,* 32 B. T. A. 813; *Julius Forstmann,* 6 B. T. A. 21; *Edwin T. Pollock,* 10 B. T. A. 1297; *Joe May,* 39 B. T. A. 946.

The question determined by these cases has never been passed upon by this Court. It involves the interpretation of federal income tax statutes, and affects many taxpayers.

If the Trial Court intended to charge that entertainment expenses for business purposes at home were deductible, then his modification of the requested charge resulted in an ambiguity which deprived the petitioner of the clear statement of the law to which he was entitled.

> "It is not sufficient that an instruction be so drawn that a jury may reach the right conclusion, but it is required that it be so framed that the jury may not draw the wrong conclusion therefrom." *Miller* v. *U. S.,* 120 F. (2d) 968, 972 (C. C. A. 10).

In *Egan* v. *U. S.,* 287 Fed. 958, the Court of Appeals for the District of Columbia said, at page 970:

> "The defendant is entitled to have the law of the case clearly and concisely stated to the jury, and it is error to refuse prayers which specifically state the law applicable to a certain branch of the testimony, and substitute therefor a charge which, to the legal mind, may contain the correct principle, but so involved in its verbiage as to tend to confuse rather than enlighten the average juror."

POINT IV.

The exclusion of the testimony of Revenue Agent Mulligan constituted reversible error and deprived petitioner of constitutional rights.

The facts regarding the exclusion of Agent Mulligan's testimony are summarized in the petition in Point IV of the matters involved. The Court below ruled that no constitutional question was presented by the record. Such holding is in conflict with the ruling of this Court in *McCandless* v. *U. S.*, 298 U. S. 342, that a specific offer of evidence is not needed where an entire class of evidence has in advance been formally declared inadmissible by the Trial Court during a preliminary argument or colloquy. The ruling also is in square conflict with the established law as set forth in legal treatises. Professor Wigmore has stated the law as follows:

> "But a specific offer of evidence is not needed where an entire class of evidence has been in advance formally declared inadmissible by the Trial Court during preliminary argument or colloquy; for the Court's ruling relates forward to all possible offers of such evidence and renders them needless. Moreover, after such a ruling, the persistence of counsel in making or repeating such offers may be treated as improper attempts to get before the jury the effect of such evidence."
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> I *Wigmore on Evidence*, 3rd Ed., p. 318.

The validity of the regulations upon which the testimony was excluded was thus squarely raised and the record therefore presented a constitutional question. The refusal of the Court below to pass on the constitutional question presented

deprived the petitioner of his constitutional rights under the Sixth Amendment.

Glasser v. *U. S.*, U. S. , decided January 19, 1942.

POINT V.

The refusal to charge as requested and the charge regarding the weight to be given to character evidence constituted reversible error.

The Court in its charge minimized the importance of this testimony (R. 1829-30). The specific point of difference between the charge as given and as requested was the very important one that character evidence might itself, considered with all the other evidence, be deemed sufficient to raise a reasonable doubt. The Court did not so charge. Instead it placed character evidence in the same category with all other evidence and then proceeded to caution against excuse or leniency (R. 1829-30). To this extent the charge was entirely one-sided. This Court in *Quercia* v. *U. S.*, 289 U. S. 466, squarely held that the privilege of the Judge in a criminal case to comment on the facts has its inherent limitations. The discretion of a trial Judge is not arbitrary and uncontrolled, but judicial, to be exercised in conformity with the standards governing the judicial office. The influence of the trial Judge on the jury is necessarily and properly of great weight and his slightest word or intimation is received with deference and may prove controlling. Among the limitations laid down by the *Quercia* case was a limitation that the Court may not give a "one-sided" comment on the evidence. The Court below in holding that the Trial Court correctly instructed regarding the weight to be given character evidence, made a ruling which is in probable

conflict with the principles enunciated by this Court in the *Quercia* case.

The weight to be given to character evidence has not been passed on by this Court since *Edgington* v. *U. S.*, 164 U. S. 361 (1896). Confusion on the subject exists in the opinions of various Circuit Courts of Appeals: *Egan* v. *U. S.*, 287 F. 958 at 968-969 (Ct. of App. D. C. 1923); *Jones* v. *U. S.*, 289 F. 536 at 538-539 (Ct. of App. D. C. 1923); *Roth* v. *U. S.*, 294 F. 475 at 482 (C. C. A. 6th 1923); *Sunderland* v. *U. S.*, 19 F. (2d) 202 at 214-216 (C. C. A. 8th 1927); *Estabrook* v. *U. S.*, 28 F. (2d) 150 at 154 (C. C. A. 8th 1928); *Cohen* v. *U. S.*, 282 F. 871 at 872-873 (C. C. A. 3rd 1922); *Miller* v. *U. S.*, 120 F. (2d) 968 (C. C. A. 10th 1941).

CONCLUSION.

For the reasons stated in the petition and in this brief, it is respectfully submitted that the application for a writ of *certiorari* should be granted.

Dated, New York, May 7, 1942.

Respectfully submitted,

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